

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

March 19, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-810
ADMINISTRATION (MSHA)	:	A.C. No. 46-09020-164130
	:	
v.	:	Docket No. WEVA 2009-811
	:	A.C. No. 46-09020-167075
DOUBLE BONUS COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 5, 2009, the Commission received motions seeking to reopen two penalty assessments issued to Double Bonus Coal Company (“Double Bonus”) that may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Double Bonus seeks reopening on the grounds that it never received the two assessment forms.² It submits evidence that Assessment No. 000164130 was returned undelivered to the

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-810 and WEVA 2009-811, both captioned *Double Bonus Coal Co.* and involving similar procedural issues. 29 C.F.R. § 2700.12.

² The requests to reopen were sent by James F. Bowman, who describes himself as a “Consultant/Litigator.” Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in

Department of Labor's Mine Safety and Health Administration because of a supposedly wrong address. It also alleges that Assessment No. 000167075 was delivered to a neighboring mine and never received by Double Bonus. The Secretary of Labor states that, based on the circumstances alleged in the motions, she does not object to reopening the assessments.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Rule 3(b), which include parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Bowman satisfied the requirements of Rule 3 when he filed the operator’s requests. We have determined that, despite this, we will consider the merits of the operator’s requests in this instance. However, in any future proceeding before the Commission, including further proceedings in these cases, Mr. Bowman must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

Having reviewed Double Bonus' requests and the Secretary's responses, we conclude that the proposed assessments at issue have not become final orders of the Commission. We deny Double Bonus' motions as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006). Because each motion specifies the individual penalties in the respective assessments that Double Bonus wishes to contest, those statements in the motions can serve as the operator's notices of contest. Consequently, and consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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